19345

IN THE

Supreme Court of the United States.

October Term, 1902. No. 163.

THE ATLANTIC AND PACIFIC TELEGRAPH COMPANY,

Plaintiff in Error,

AGAINST

THE CITY OF PHILADELPHIA,

Defendant in Error.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

Argument.

When preparing its brief of argument in this case the defendant in error had before it the galley proof of the brief of plaintiff in error. The argument, as then presented by the plaintiff in error, began as follows:

> "It is to be noted that this case differs from that of the Western Union Telegraph Company, plaintiff in error, against the Borough of New Hope (October Term, 1902, No. 101) argued last December, in this, that while in this case there is evidence that the municipality exercised certain reasonable police supervision and regulation over the first construction and subsequent maintenance of telegraph poles and wires, and from said evidence,

although contradicted in part at least, it may be inferred that the municipality was put to and did actually incur some expense in such police supervision and regulation which it might lawfully demand that the telegraph company should reimburse to it, yet, in the New Hope case the affirmative and uncontradicted evidence was that no such regulation and supervision had, in fact, been exercised and no such expense had, in fact, been incurred.

"In other words, while in the New Hope case it was contended by the Telegraph Company that no ground for the imposition of a tax as incident to a police regulation had been shown, it is conceded that in this case there is evidence from which it can be inferred that some tax as incident to a police regulation can be imposed. The main contention in the case under argument is that this evidence is entirely too vague and indefinite to sustain the charge sought to be recovered, and that the affirmative evidence produced by the plaintiff in error shows that it was excessive."

In the brief as filed the plaintiff in error omitted the above statements, and substituted therefor the following:

"It is to be noted that this case differs from that of the Western Union Telegraph Company, plaintiff in error, against the Borough of New Hope (October Term, 1902, No. 101), argued before this Court in December last and recently decided in this, that in that case the Court left it to the jury to find whether the license fee exceeded what was reasonable under the circumstances, while in this case the Court itself passed upon the question and gave a binding instruction to the jury to find for the plaintiff for the whole amount of both taxes, *i. e.*, the pole tax imposed by ordinance of 1881 and the wire tax imposed by ordinance of 1883."

"The contention in this case is that the City of Philadelphia had no power to impose either of the taxes in question, and that even if the city has the power to impose any charge as incident to a police regulation, the tax on the wires imposed by ordinance of 1885 was not imposed as part of such police regulation and is not justified under the police power; and that in respect to the

ordinance of 1881, the evidence showed that the amount thereof was excessive, and therefore that the Court below erred in instructing the jury to find for the plaintiff for the full amount sued for."

It will thus be seen that the plaintiff in error while originally conceding the right of the defendant in error in the exercise of the police powers to impose license fees, appears now to deny to the defendant in error that right, and also to contend that the license fees charged by the Ordinances of 1881 and 1883 were not imposed as a police measure. The defendant in error has learned that it is the intention of the Western Union Telegraph Company to ask for a re-argument of the case of the Western Union Telegraph Company against the Borough of New Hope, decided by this Court on January 5, 1903, and thus, if possible, to re-open the question of the power of a municipality to impose such charges, and of their reasonableness.

The defendant in error considers that the question of its right to impose the license fees claimed in this case, and of the reasonableness of the charges, has been settled by judicial determinations in the State of Pennsylvania and elsewhere, and by the authority of cases in the various United States courts.

In view of the desire of the plaintiff in error to re-open the questions, the defendant in error submits for the consideration of the Court the following principles:

I. The defendant in error, a municipal corporation, has the right in the exercise of its police power to impose upon the plaintiff in error license fees for the poles and wires erected on and run along the public highways.

II. That the license fees charged by the Ordinances of 1881 and 1883 by the defendant in error on the plaintiff in error were imposed as police regulations

III. That the license fees so charged were reasonable and the ordinances imposing them were valid.

IV. That the reasonableness of the charges was a question to be determined by the Court and not by the jury.

---

1. The defendant in error, a municipal corporation, has the right in the exercise of its police power to impose upon the plaintiff in error license fees for the poles and wires erected on and run along the public highways.

It is difficult to define exactly what are police powers. In American and English Encyclopædia of Law, Vol. 22, New Edition, page 916, it is said:

> "That the police power in its broadest acceptation means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest."

The danger to the public and to the property of the citizens by the erection of poles on the public highway and the running of numerous wires from one pole to another is so evident that their regulation, construction and inspection would come within any possible definition of police power. The regulation of poles and wires has frequently been cited in text books as included within the objects calling for the exercise of the police power. (See American and English Encyclopædia of Law, Vol. 22, New Edition, page 918.)

In City of Philadelphia *vs.* Western Union Telegraph Company, 89 Federal Reporter, 454, Mr. Justice SHIRAS says:

> "That the exaction of a license tax is a valid exercise of power by municipal corporations, in order to cover expenses to which they may be put in the enforcement of their police rules and regulations."

and this was in reference to similar charges as claimed in this case against the Western Union Telegraph Company.

The right of the defendant in error under its police powers to impose such charges is unwillingly conceded by the plaintiff in error and is supported in Pennsylvania in the following cases:

Western Union Tel. Co. *vs.* City of Philadelphia, 22 W. N. C., 39;
Mutual Union Tel. Co. *vs.* City of Phila., 22 W. N. C., 39;
Allentown *vs.* Western Union Tel. Co., 148 Pa., 117;
Chester *vs.* Phila., Reading & Pottsville Tel. Co., 148 Pa., 120;
Chester *vs.* Western Union Tel., 154 Pa., 466;
Philadelphia *vs.* American Union Tel. Co. 167 Pa., 406;
Borough of N. Braddock *vs.* N. Central District & Printing Co., 11 Superior Court, 24;
New Hope Borough *vs.* Telegraph Co., 16 Superior Ct., 306;
Taylor Borough *vs.* Postal Tel. Co., 16 Superior Ct., 344;
Taylor Borough *vs.* Postal Tel. Co., 202 Pa., 583.

In Western Union Telegraph Co. *vs.* City of Philadelphia, 22 W. N. C., 39, the Referee determined that,

> "The City of Philadelphia has a perfect right, as a matter of police regulation, to supervise and control the erection of poles upon and the stretching of wires along its streets."

and he therein further observes:

> "To say that a corporation or an individual which has the right, either as a chartered body or as a natural

person, to erect poles on the public highways, can do so without any restraint whatever, and without any liability to have the exercise of that right regulated with reference to the rights of other persons exercised upon the same highways, or, to the rights of the municipality, appears to me to be the assertion of a proposition which would practically take the control of the streets out of the hands of the city and place it in the hands of individuals or corporations."

In that same case President Judge HARE, of Court of Common Pleas No. 2, of Philadelphia County, says :

"The streets are already lined with masts sustaining an intricate web of wires, actually or potentially charged with an electric current which is dangerous unless approached with caution, and no argument is requisite to show the inconvenience that might result if the number could be indefinitely increased. They are used not merely for telegraphy, but for telephones, and for the transmission of electricity as a source of motive power and illumination ; and much as they have multiplied in the past, we may believe that in the near future they will be still more numerous. If a fire occurs, the wires impede the erection of ladders and must be cut with proper implements before the firemen can ascend to the roofs. That some regulating hand should be applied under these circumstances for the protection of the public is apparent ; and it is not less necessary, for the sake of the various companies, which acting in a limited area and by analogous means might otherwise be brought into conflict." * * *

"The founder of our city was a man of liberal views, whose ideas were on many points in advance of his age, and if the plan of Philadelphia, as devised by him, be compared with that of any other city then existing on the globe, we may admire his forethought in providing for the space and air which were wanting in European capitals ; but he could not reasonably anticipate that the population of an obscure provincial town, would, in the course of two centuries, grow to nearly a million of souls, with a prospect of a still larger increase in the next hun-

dred years. Still less could he have foreseen that in addition to the sewers, the water-pipes, and the lamp-posts, which he presumably contemplated, although the two former were as yet practically unknown in England, gas would be introduced as a means of light, of heat and of power; that electricity would be discovered and applied for the attainment of the same ends; that companies would be legislatively authorized to use the highways as channels for the transmission of steam; or that railways would intersect the streets, or be carried along on structures overlooking the houses, and leaving scant room for the passage of ordinary vehicles." * * *

"We have here a spectacle that almost bewilders the imagination. In addition to sewers, the water and gas pipes, with which the soil of our highways is already tunneled for municipal purposes, with a consequent liability to be torn up whenever a sewer bursts or a main is in need of repairs, any company authorized as above to supply light, heat or power, may burrow side by side with the municipality at the risk of bringing steam, water, gas and electricity into such close conjunction as will give rise to explosions like those recently witnessed in London and Philadelphia. Nor is this all; if we look above ground we may find reason to apprehend that the occupation of streets by structures erected for purposes which, though benefical, are foreign to the original design, may, if these are unduly multiplied, lead to injurious consequences. Had Penn anticipated such a result he no doubt would have made all the principal streets as wide as Arch or Market streets, but unfortunately many of our thoroughfares are too narrow for the tide of traffic and the municipal uses to which they are necessarily put, and certainly do not afford room for the multifarious works that may be superadded whenever any five men think fit to claim the privilege.

"Every one who considers the circumstances which I have inadequately portrayed, and the complications to which they may give rise, will, I think, agree that the city should have some supervision and control in a matter which deeply concerns her citizens, and the need

will be distinctly apparent if we reflect that she is responsible for the condition of the highways, and may be made answerable in damages for a want of care in guarding against the accidents that are only too likely to occur. Should a sewer burst, or a gas main explode and injure persons or property; or were one of the numerous telegraph poles to be blown down by a gale of wind with a like result, the city would be the first mark in a suit for compensation. It is, therefore, her right and duty in the interests of humanity, and that her financial burdens may not be unduly increased, to keep a watchful eye on acts which, although done by persons claiming under a higher source, are yet so interwoven with mat ters in which she is directly concerned that it is difficult to draw the line and say where her responsibility ends.

"We are, therefore, unable to agree with the referee that a license fee of $1. is so clearly excessive as to justify the Court in treating it as invalid. The question is not, in our opinion, merely what it will cost the city to take care that the telegraph poles are sound and in good order, that the wires are properly hung, and do not by 'fouling' the city wires hinder the transmission of police messages and fire alarms. It is an established principle that remuneration should be in proportion not only to time and outlay, but to responsibility, and a public or private agent who is exposed to loss may demand higher pay."

It would seem unnecessary to refer to the many authorities which determine that the regulation of poles and wires of telegraph companies is within the police powers. The Courts of Common Pleas and the Superior Court and Supreme Court of the State of Pennsylvania have adjudicated the right of the defendant in error to exercise police powers by regulating the erection of poles and wires on the public highways, and this law as announced by the courts of Pennsylvania will control all other courts where the question of the power of the defendant in error arises.

The right of the defendant in error to exercise this power and to impose license charges is recognized in Dillon

on Municipal Coporations, 4th edition, volume 2, page 830. That learned author considers that the abutting owner is entitled to compensation from the telegraph company; and on page 831, in referring to the use of the highways by telegraph companies, he says:

> "On the whole, the safer and perhaps sounder view is that such a use of the street or highway, attended as it may be especially in cities with serious damage and inconvenience to the abutting owner, is not a street or highway use proper, and hence entitles such owner to compensation for such use, or for any actual injury to his property caused by poles and lines of wire placed in front thereof."

2. That the license fees charged by the Ordinances of 1881 and 1883 by the defendant in error on the plaintiff in error were imposed as police regulations.

The defendant in error while not conceding that it is without power to levy a tax upon the plaintiff in error, or charge a rental for the use of the highways, contends that the Ordinances of 1881 and 1883 do not either levy a tax or rental, but are police regulations.

In Western Union Telegraph Company *vs.* City of Philadelphia, 22 W. N. C., 39, the same ordinances were before the Court, and the same charges imposed as in this case. These ordinances were held to be valid as police regulations and the charges imposed to be reasonable and in the exercise of police power. So in Philadelphia *vs.* American Union Telegraph Co., 167 Pa., 406.

In Allentown *vs.* Telegraph Co., 148 Pa., 117, and Chester *vs.* Telegraph Co., 148 Pa., 120, the charge per pole was the same as in this case, namely, $1 per annum. So in Chester City *vs.* Telegraph Co., 154 Pa., 464, the charge per pole was $1 per annum. In Taylor Borough *vs.* Postal Telegraph Co., 202 Pa., 583, the charge per pole was $1 per

annum, and for wires $2.50 per mile per annum, the same as in this case. In Western Union Telegraph Company *vs.* Borough of New Hope, decided by this Court on January 5, 1903, the charges were the same as in this case, namely, $1 per pole per annum, and $2.50 per mile of wire per annum.

The plaintiff in error quotes at considerable length from St. Louis *vs.* Western Union Telegraph Co., 39 Federal Reporter, 59; St. Louis *vs.* Western Union Telegraph Company, 148 U. S., 92; St. Louis *vs.* Western Union Telegraph Company, 149 U. S., 465, and St. Louis *vs.* Western Union Telegraph Co., 63 Federal Reporter, 68.

There is a very clear distinction between those cases and the one now before the Court. As was said by this Court in St. Louis *vs.* Western Union Telegraph Co., 148 U. S., 92, the charge made by the City of St. Louis of $5 per pole per annum, was a rental for the use of the highways and not a license fee exacted as a police regulation. It will be remembered that in that case the lower Court held that even as a rental the charge of $5 per pole per annum was excessive and unreasonable.

A rental differs materially from a license fee imposed under police powers. In the case of a rental the contractual relation exists, and one party cannot arbitrarily fix the amount to be charged. It must be agreed upon, or as in the case of water rent, the Court will inquire into the reasonableness of the charge, and require the party levying it to show that it is reasonable.

In the case of St. Louis *vs.* Western Union Tel. Co., 148 U. S., 92, in referring to the peculiar character of a rental, this Court said:

> "Indeed, it may be observed, in the line of the thoughts heretofore expressed, that this charge is one in the nature of rental; that the occupation by this Interstate Commerce Company of the streets cannot be denied by the city; that all it can insist upon is, in this respect, reasonable compensation for the space in the

streets thus exclusively appropriated; and it follows in the nature of things that it does not lie exclusively in its power to determine what is a reasonable rental. The inquiry must be open in the Courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city."

The ordinances by which the defendant in error imposes the charges herein claimed show that it was in the exercise of the police powers, and not as a rental for the use of the highways. The ordinance of January 6, 1881, (see Record, page 26) is entitled "An ordinance to regulate the erection and maintenance of telegraph poles in the corporate limits of the City of Philadelphia." The preamble indicates that the ordinance was ordained for the purpose of protecting the public from injury likely to occur from inadequate or unsound telegraph poles. So the ordinance of March 30, 1883, (see Record, page 28). These ordinances provided for the inspection of poles and wires and made it the duty of one of the bureaus of the city to look after the construction of the poles and wires of the telegraph and telephone companies.

A license fee under police regulations is distinct from a tax. In American and English Encyclopedia of Law, Volume 22, New Edition, page 917, this distinction is thus referred to:

> "The police power must also be distinguished from the taxing power, and the distinction is this: that the taxing power is exercised for the raising of revenue and is subject to certain limitations, which will be treated elsewhere, while the police power is exercised only for the purpose of promoting the public welfare, and though this end may be attained by taxing or licensing occupations, yet the object must always be regulation and not the raising of revenue, and hence the restrictions upon the taxing power do not apply."

That the license fee is paid into the treasury and incidentally results in revenue, does not make it a tax, and if it be exacted for the purpose of regulation, it comes within the police powers.

3. That the license fees so charged were reasonable, and the ordinances imposing them were valid.

Charges similar to those claimed in this case have been sustained by the various courts of Pennsylvania and by the courts of New York.

It is required of the plaintiff in error when it alleges that the charges were unreasonable, to assume the burden of showing it. That it was unable to do so, of itself proves the reasonableness of the charge. The action of the legislative body is presumed to be proper, and a court would not hold otherwise unless in a very clear case. Indeed, it would appear that the unreasonableness of the charges should be so clear that no proof should be needed:

In Van Baalen *vs.* People, 40 Michigan (S. C., 1879), GRAVES, *J.*, says:

> "The Recorder found the facts, and among others, that the business of pawn broking gives rise to a heavy city expense, and especially in the increase of police duty and supervision which it necessitates, and he ascertained and found in terms that the sum charged does not greatly exceed the incidental and consequential expense, and it appears plainly enough from his explanations and from matters subject to judicial notice, that it is quite impossible to say the city can derive a particle of profit from the rate objected to.
>
> "Of course, the subject will not admit of nice calculation, and it would be futile to require anything of the kind. Where the power to license is not evidently abused and made a pretext for doing what is a violation of constitutional right, the courts ought not to interfere with municipal discretion."

4. That the reasonableness of the charges was a question to be determined by the Court and not by the jury.

This is submitted as it is believed to be the law, and not because the defendant in error needs to invoke this principle

in order to sustain the judgment of the Court below. As has been previously stated, the learned Judge of the United States Circuit Court submitted the question to the jury in the only way under the evidence it could be left to it. The plaintiff in error having failed to produce the slightest evidence tending to show the charges unreasonable, and there being no question in dispute, the Court told the jury that the defendant in error had made out its case, and a verdict should be rendered for the full amount of the claim.

It is suggested, however, that under the authorities the Court could have taken the case away from the jury and determined it as a question of law.

In City of Philadelphia *vs.* Western Union Tel. Co., 89 Federal Reporter, 454, counsel for both plaintiff and defendant when that case was heard in the U. S. Circuit Court admitted that it was a question of law for the Court, and not a question of fact for the jury.

In Commonwealth *vs.* Worcester, 3 Pickering (Mass.), 462, the Court said:

> "So the evidence adduced to prove the by-law unreasonable was clearly inadmissible. It was for the Court to decide whether 'the by-law was reasonable or not; and evidence to the jury on this point was irrelevant.'"

Judge DILLON in his work on Municipal Corporations, 4th Edition, Volume 1, page 404, sums up the authorities when he says:

> "Whether an ordinance be reasonable and consistent with the law or not is a question for the Court, and not the jury, and evidence to the latter on this subject is inadmissible."

In support of this he cites many cases in the notes, and when referring to Clason *vs.* Milwaukee, 30 Wis., 316, in which the opposite view was adopted, he says:

> "But the argument of the counsel for the city, that this view makes the same by-law 'valid in one case and

invalid in another, according to the varying weight of testimony and the varying views of juries,' seems unanswerable, and the text states probably the true doctrine."

This would appear to be a reasonable and proper construction, as otherwise the plaintiff in error in this case might one year be subjected to the full charges made by the Ordinances of 1881 and 1883, and in another year a different charge, according to the whim, caprice or feeling of a jury. To leave it to a jury to determine as a question of fact would be substituting the jury for the legislative body elected by the people to determine such matters. The Court would have the right to interfere so as to prevent injustice, but it ought only to be in a clear case and when it is apparently unreasonable.

The Western Union Telegraph Company in its petition and argument for a re-hearing of the case decided by this Court on January 5, 1903 (Western Union Tel. Co. *vs.* Borough of New Hope), gives an illustration of the uncertainties arising from submitting the question to a jury. Its fourth reason why a re-hearing should be allowed is as follows:

"The Court, in referring to the case in 202 Pennsylvania, 532, erred in inferring that the case there considered was similar to the case at bar, inasmuch as the reasonableness of the ordinance was submitted to a jury in Borough of New Hope *vs.* Postal Telegraph Cable Company (202 Pa., 532), which jury returned a verdict in favor of the borough for less than the amount called for by the ordinance.

"That a comparison of that case with the record in this will show that both cases were tried on the same day, before the same Court and the same panel of jurors, and for a similar cause of action; and that while in this case the ordinance of the borough was enforced, in the Postal Case there was a substitution of the discretion of the jury for that of the Burgesses."

And the petitioner then adds:

"And plaintiff in error insists that an ordinance levying any sort of tax, which on its face or by judicial

> construction, is thus made to operate partially and unequally, as different juries may differently determine, is unreasonable and void."

This conclusion is incorrect, and it should have been that it is wrong to submit the question to a jury to determine, and the reasonableness of the ordinance should have been determined by the Court.

In the case referred to, Borough of New Hope *vs.* Western Union Telegraph Co., 16 Superior Court, 306, the learned Court said:

> "The facts being undisputed, we take it that the question of the validity of the ordinance was for the Court to decide. But, if on the undisputed facts, the Court would not have been warranted in declaring the ordinance void, the submission of the question of the reasonableness of the fee to the jury was an error of which the defendant has no just cause to complain."

If the reasonableness of the ordinance is determined by the Court, then it becomes *res adjudicata*, but if it be a question to be submitted to the jury, the verdict would only be conclusive between the same parties for the same charges, and every time the defendant in error made claim for the license fees, for other years or from other companies, a jury trial would result if the telegraph company opposed the suit.

JAMES ALCORN,
Assistant City Solicitor,

JOHN L. KINSEY,
City Solictor,
for Defendant in Error.